

## **CHAPTER 3.0**

### **PURPOSE AND NEED FOR THE PROPOSED ACTION**

---

#### **3.1 PURPOSE AND NEED FOR THE PROPOSED ACTION**

##### **3.1.1 Purpose of the Proposed Action**

The purpose of the proposed action—issuance of an incidental take permit pursuant to Section 10(a)(1)(B) of the ESA—is to enable Hyundai and the City to develop an automotive test course facility (Facility) and water line extension in eastern Kern County, California on a site occupied by the federally and state-listed threatened desert tortoise.

Pursuant to Section 10(a)(1)(B), the USFWS must determine that the following conditions have been met:

- (i) The taking would be incidental to an otherwise lawful activity.
- (ii) The applicant would implement measures to minimize and mitigate to the maximum extent practicable.
- (iii) The applicant would ensure that adequate funding would be available to implement the HCP.
- (iv) The taking would not appreciably reduce the survival and recovery of the species in the wild.
- (v) There are no further measures that should be required prior to issuance of a permit.

The USFWS may choose to do any of the following:

- (1) Issue a permit conditioned on implementation of the HCP as submitted by the applicant.
- (2) Issue a permit conditioned on implementation of the HCP as submitted together with other measures specified by the USFWS.
- (3) Deny the permit.

##### **3.1.2 Need for the Proposed Action**

Under Section 9 of the ESA, unauthorized impacts to a species listed as endangered or threatened may constitute a take and are prohibited. Take of a listed species that is incidental to an otherwise lawful activity can be authorized under Section 10 of the ESA. The proposed project would impact habitat occupied by the desert tortoise (*Gopherus agassizii*), a federally and state-listed threatened species. Hyundai and the City jointly have applied to the USFWS for issuance of an incidental take permit pursuant to Section 10(a)(1)(B) of the ESA for the proposed project, have submitted a Habitat Conservation Plan in support of that application, and have incorporated measures into the proposed project to avoid, minimize, and compensate for adverse effects to desert tortoise.

## **3.2 REGULATORY FRAMEWORK**

### **3.2.1 National Environmental Policy Act**

NEPA and its supporting federal regulations establish certain requirements that must be met for any project that is "...financed, assisted, conducted, or approved by a federal agency...." The USFWS is the lead agency pursuant to NEPA for the issuance of a permit for incidental take pursuant to Section 10(a) of the ESA. In making a decision on the issuance of a federal permit for the proposed project, the USFWS is required under NEPA to "...determine whether the proposed action may significantly affect the quality of the human environment." This EA/HCP satisfies that requirement.

### **3.2.2 Federal Endangered Species Act of 1973, as Amended**

The purposes of the ESA are to provide a means to conserve the ecosystems that endangered and threatened species depend on and to provide a program for conservation and recovery of these species. The ESA provides regulatory protection for species listed as threatened or endangered under the ESA. Section 9 of the ESA prohibits the take of listed species. The ESA and its implementing regulations define "take" as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such conduct." "Harm" is further defined by regulation as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."<sup>1</sup> Section 10(a) of the ESA includes provisions authorizing take that is incidental to, but not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) provides for the issuance of permits for take that is incidental to a lawful activity that does not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The desert tortoise, a federally and state-listed threatened species, occupies the proposed project site. Hyundai and the City jointly have submitted to the USFWS an application for a permit, pursuant to Section 10 (a)(1)(B) of the ESA, to authorize the incidental take of the desert tortoise. The implementing regulations for Section 10(a) specify the criteria by which a permit allowing the incidental take of a threatened species may be obtained.<sup>2</sup> A Habitat Conservation Plan (HCP) is required to support issuance of a permit, and has been submitted by Hyundai and the City.

---

<sup>1</sup> Office of the Federal Register National Archives and Records Administration, October 2000. *Code of Federal Regulations*. 50 CFR 17.3. Washington, DC: U. S. Government Printing Office.

<sup>2</sup> Office of the Federal Register National Archives and Records Administration, October 2000. *Code of Federal Regulations*. 50 CFR 17.32. Washington, DC: U. S. Government Printing Office.

### 3.2.3 Section 404 of the Clean Water Act

Based on a review of the USGS 7.5-minute series Sanborn, California topographic quadrangle,<sup>3</sup> the National Wetland Inventory Map Sanborn, California quadrangle<sup>4</sup> and aerial photos of the proposed project area, it was determined that there are no areas on the proposed project site subject to the jurisdiction of the U.S. Army Corps of Engineers (Corps). A letter dated August 14, 2002<sup>5</sup> was transmitted to the Corps to notify and obtain verification that the proposed project contains no Corps jurisdictional areas. This letter indicated that the isolated dry desert washes present on site do not connect to, and are not associated with, any larger rivers or lakes subject to the jurisdiction of the Corps pursuant to Section 404 of the Clean Water Act. The only named and identified blue-line stream on the Sanborn topographic quadrangle is Cache Creek, which does not run through the proposed project site. Plant community mapping in the field indicates that no riparian or wetland habitat is present within the proposed project site. All isolated dry desert washes consist of sandy bottoms and do not support riparian or wetland plant species. All isolated dry desert washes appear to carry water only during rain events and drain to low points within the proposed project site. In its letter dated September 27, 2002, the Corps determined that the proposed project site is not subject to Corps jurisdiction.<sup>6</sup>

### 3.2.4 California Endangered Species Act

The CESA is administered by the CDFG and its requirements closely parallel those of the ESA. CESA prohibits the taking of listed species except as otherwise provided by state law. CESA also applies take prohibitions to species petitioned for listing (state candidates). CDFG is required to coordinate with the USFWS for actions that involve both federally and state-listed species.

The Mohave ground squirrel and desert tortoise, both state-listed threatened species, have been found on the proposed project site and are protected under CESA. Hyundai and the City intend to request from CDFG, pursuant to Section 2080.1 of the CESA, a determination that the federal Section 10(a)(1)(B) incidental take permit is consistent with CESA and USFWS and CDFG have been coordinating on the ESA Section 10(a)(1)(B) permit. Hyundai and the City also have submitted an application to CDFG for issuance of an incidental take permit for the proposed project, pursuant to Section 2081 of the CESA, for impacts to Mohave ground squirrel. Section 2081 of the CESA provides for the issuance of an incidental take permit for activities that are incidental to a lawful activity and does not jeopardize the survival and recovery of the species in the wild.

---

<sup>3</sup> United States Geological Survey (USGS), 1973 (Photo inspected 1980). Sanborn, CA 7.5-Minute Topographic Quadrangle. Denver, CO: United States Department of the Interior Geologic Survey.

<sup>4</sup> National Wetlands Inventory Map, August 1986 (Aerial photography, revised 1995). Sanborn, California. Scale 1:24,000.

<sup>5</sup> Sapphos Environmental, Inc., 14 August 2002. (Letter to Mr. Aaron Allen, Senior Project Manager, United States Army Corps of Engineers). Contact: Sapphos Environmental, Inc., 133 Martin Alley, Pasadena, CA 91105.

<sup>6</sup> U.S. Army Corps of Engineers, 17 September 2002 (Letter to Sapphos Environmental, Dr. Brad Blood. Contact: Sapphos Environmental, Inc. 133 Martin Alley, Pasadena, CA 91105). Prepared by: U. S. Army Corps of Engineers, David Castanon, Chief, North Coast Section Regulatory Branch, Ventura Field Office, 2151 Alessandro Drive, Suite 110, Ventura, CA 93001.

## Section 1603 of the California Fish and Game Code

All diversions, obstructions, or changes to the natural flow, bed, channel, or bank of any river, stream, or lake in California that supports fish or wildlife resources are subject to the regulatory authority of the CDFG pursuant to Sections 1600 through 1603 of the California Fish and Game Code (Code). Specifically, Section 1603 of the Code governs private party individuals. Under the Code, a stream is defined as a body of water that flows at least periodically or intermittently through a bed or channel having banks and supporting fish or other aquatic life. Included are watercourses with surface or subsurface flows that support or have supported riparian vegetation. CDFG's jurisdiction within altered or artificial waterways is based on the value of those waterways to fish and wildlife. CDFG must be contacted for a streambed alteration agreement for any project that may impact a streambed or wetland. CDFG has maintained a "no net loss" policy regarding potential impact, and has required replacement of lost habitats on at least an acre-for-acre basis.

Portions of the project may affect a small area of desert wash that may be subject to CDFG jurisdiction. On September 19, 2002, Hyundai and the City submitted to CDFG an application for a Streambed Alteration Agreement (SAA), pursuant to Section 1603 of the Code, to construct those portions of the project. A Final Addendum to the Notification to a Lake or Streambed Alteration was submitted to CDFG on April 4, 2003 and CDFG currently is finalizing the SAA for the proposed project.

### 3.3 RELATIONSHIP OF PROPOSED PROJECT SITE TO WESTERN MOJAVE LAND TENURE ADJUSTMENT PROGRAM

On January 12, 1991, BLM issued a Record of Decision (ROD) for the Western Mojave Land Tenure Adjustment Project (LTA Project).<sup>7</sup> The LTA Project area covered 2.8 million acres, including approximately 522,000 acres of public lands managed by BLM and approximately 6,700 acres managed by the State of California. By exchanging publicly held lands for private lands, the LTA Project provided a means to consolidate large areas of sensitive habitat into public ownership. The ROD for the LTA Project was issued following completion of consultation under Section 7 of the ESA, between BLM and USFWS, and issuance of a Biological Opinion dated September 4, 1990.<sup>8</sup> The ROD for the adopted LTA Project states,

The desert tortoise and Mohave ground squirrel, having previously undergone consultation and conference, will not need additional consultation or conferences unless significant change in their status, habitat, or potential impacts to them from implementation of the LTA Project becomes apparent. Both Federal and State wildlife agencies concur that the implementation of the LTA Project results in a net benefit to both species through consolidation of manageable habitat.

---

<sup>7</sup> Bureau of Land Management, 1991. *Western Mojave Land Tenure Adjustment Project Record of Decision*. Contact: BLM, California Desert District, Barstow Resource Area, Ridgecrest Resource Area, 150 Coldwater Lane, Barstow, CA 92311.

<sup>8</sup> Ibid.

The 1990 Biological Opinion indicated that land owners participating in the exchange program would be exempt from the need to obtain a Section 10(a)(1)(B) permit from the USFWS under the ESA. On September 10, 1998, the USFWS issued a second Biological Opinion clarifying that developers of land acquired through the LTA Project must obtain an incidental take permit and implement measures to minimize the extent of incidental take of desert tortoises.

The September 10, 1998 Biological Opinion specifically addressed the land exchange between BLM and Catellus Development Corporation (Catellus). The land exchange included the addition of approximately 816 acres known as the I-15/SH-58, I-15/SH-58 Connector, Barstow, and Barstow Heights properties to the LTA Project area. Catellus received 4,810 acres of BLM lands in exchange for 14,800 acres of critical habitat of the desert tortoise in the Black Mountain and Fossil Canyon areas, north and northwest of Barstow. The Black Mountain and Fossil Canyon areas are both within the known range of the Mohave ground squirrel.

Three of the parcels, totaling 1,140 acres, exchanged to Catellus are located within the proposed project area (Figure 2-1) (USGS 7.5-minute series California City topographic quadrangle, T11N, R11W, south half of Section 10, Section 14, and east third of east half of Section 22). In the 1998 Biological Opinion, the USFWS determined that although developers of exchanged lands are required to obtain a Section 10(a)(1)(B) permit from the USFWS for incidental take of desert tortoises, developers of exchanged lands are not required to provide any additional compensation in the form of land.